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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. [illegible] 88

HUNTER AND CO., INC., AN ILLINOIS CORPORATION
Petitioner,

vs.

VILLAGE OF BELLWOOD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS, AND BRIEF IN SUPPORT THEREOF.

JOHN F. VOIGT,
Counsel for Petitioner.

MARSHALL S. HOWARD,
Of Counsel.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Hunter and Co. Inc., respectfully petitions this Court for the issuance of a Writ of Certiorari to review a judgment of the Supreme Court of the State of Illinois, entered on February 18, 1941, affirming a judgment of the County Court of Cook County, Illinois, and files herewith a certified copy of the Complete Transcript of the Record in said cause and a Brief in support of this Petition:

Summary and Short Statement of Matter Involved.

In 1927 a proceeding was filed in the County Court of Cook County for the confirmation of Bellwood Special Assessment Number 100, a special assessment levied for

the purpose of curbing, grading, draining and paving certain streets in the village, and on February 7, 1928 an order was entered in the County Court confirming said special assessment. The assessment was divided into ten annual installments and bonds were issued in 1928 to anticipate Collection of the deferred installments of said assessment. The real estate against which said assessment was levied remained largely vacant and the bonds and assessments remained substantially unpaid. H. G. Goelitz Company was and still is the holder and owner of approximately $80,000.00 in principal amount of said special assessment bonds. In May, 1940 H. G. Goelitz Company being the holder of more than 75 per cent of the bonds, petitioned the Village of Bellwood to pass an ordinance to extend the unpaid installments and refund the securities payable therefrom and to petition the County Court for confirmation thereof. At this time there were levied and payable from the same property as that against which Special Assessment 100 was levied, four other special assessments, being for water, sanitary sewer, lights and storm sewer. The installments of these warrants also remained substantially unpaid and the bonds due from these assessments remained likewise substantially unpaid. On May 8, 1940 the Village of Bellwood acting upon the petition of H. G. Goelitz Company passed an ordinance providing for the extension of the time of payment of the unpaid installments and for the refunding of the securities of Bellwood Special Assessment Number 100 and on May 13, 1940 the village filed its petition in the County Court to confirm such extension and refunding of Bellwood Special Assessment Number 100, presuming to act under Section 86A (Chapter 24, Paragraph 792A, Illinois Revised Statutes of 1939) of an Act Concerning Local Improvements. This section was added to the Local Improvement Act by amendment in 1933. (Laws of 1933, Page 231.) The

section is set forth in full in the Appendix on pages 21 to 25. Prior to the year 1933 no statute existed for the extension of unpaid special assessments or the refunding of securities issued to anticipate collection of the same. It is to be noted that the statute above described was not in effect at the time the bonds involved herein were issued in 1928 nor was there any statutory provision whatsoever in effect for extension of any special assessments or refunding of any special assessment bonds.

Hunter and Company, Inc., an Illinois corporation, the Objector and Appellant herein is the owner of the beneficial interest in two lots covered by Bellwood Special Assessment 100 and involved in the extension and refunding proceedings, said lots being described in the assessment roll attached to and made a part of the petition. Hunter and Company, Inc., is also the owner of bonds and interest coupons aggregating approximately $6,000.00 and payable from special assessments for water, sanitary sewers, lights and storm sewers which assessments were levied againt and payable from the same real estate as covered by Bellwood Special Assessment Number 100. The unpaid installments of these assessments were also past due and substantially unpaid. The unpaid amounts of the latter four special assessments combined roughly equals the amount of the unpaid assessment for Bellwood Special Assessment Number 100 as to the average lot against which the assessments are levied.

Hunter and Company filed objections to the confirmation of the extension and refunding contending that the above section 86A is unconstitutional and void.

The County Court overruled the objections finding the Statute constitutional; but found that the installments of said Special Assessment 100 ought to be extended and an order was entered so providing.

Hunter and Co., Inc., then appealed to the Supreme Court of the State of Illinois from the order overruling the objections and ordering the extension and refunding and the Supreme Court affirmed the order of the County Court.

Basis for Jurisdiction of the United States Supreme Court.

The questions herein submitted are subject to review in the Supreme Court of the United States for the reason that the refunding statute involved in the above entitled cause violates the Constitution of the United States of America in the following respects:

1. It deprives the petitioner herein of property without due process of law in violation of Section 1 of the Fourteenth Amendment.

2. It is retroactive in nature and as such impairs the obligation of contract in violation of Section 10 of Article 1.

3. It makes an unreasonable and arbitrary classification thus depriving the Objector herein of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment.

Questions Presented.

1. Whether Section 86A, being the statutory section relied on by the Village of Bellwood, deprived the objector of its property without due process of law by making the bonds owned by it of questionable value.

2. Whether Section 86A impaired the obligation of contract in making less valuable the bonds owned by the Objector.

3. Whether Section 86A is unconstitutional in creating an unreasonable and arbitrary classification between bond holders.

Reason Relied On for the Granting of the Writ of Certiorari.

1. The application of Section 86A in the instant case violates the Constitution of the United States of America in that it impaires the obligation of contract and deprives the Objector and other bondholders in similar cases of property without due process of law.

2. Section 86A is unconstitutional and void because it set up an unreasonable and arbitrary classification and deprived the Objector of its property in violation of the Constitution of the United States of America and denied to it the equal protection of the laws.

Respectfully submitted,

JOHN F. VOIGT,
Counsel for the Petitioner.

MARSHALL S. HOWARD,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of the State of Illinois is included in the Record in this case and is reported in 375 Illinois 627.

Jurisdiction.

The reasons for the jurisdiction of this Court are set forth in the Petition for Certiorari herein before set out. The decision in the Illinois Supreme Court was entered on February 18, 1941. There was no rehearing.

Statement of the Case.

All the facts are sufficiently stated in the petition, to which reference is made.

Specification of Errors.

1. The Supreme Court of the State of Illinois erred in not finding that the application of the statute involved herein and being Section 86A of an act concerning local improvements of the State of Illinois violates the Constitution of the United States of America in that it impairs the obligation of contract and deprives the objector of his property without due process of law.

2. The Supreme Court of the State of Illinois erred in not finding that Section 86A is unconstitutional and void because it sets up an unreasonable and arbitrary classifica-

tion and thereby denies to the objector the equal protection of the laws of the State of Illinois.

3. The Supreme Court of the State of Illinois erred in not reversing the decision of the County Court of Cook County and dismissing the petition of the Village of Bellwood for extension and refunding under Section 86A.

Summary of Argument.

The summary of argument is set up in the index to the petition on the first page thereof.

BRIEF.

I.

The 1933 amendment adding Section 86A to the Local Improvement Act impairs the obligation of contract and deprives bondholders of property without due process of law as it is applied to the case at bar.

Friedman v. *City of Chicago* (374 Ill. 545).

Village of Downers Grove v. *Harley,* 372 Ill. 586 (1940).

Scribner v. *Village of Downers Grove,* 372 Ill. 614 (1940).

Worthen Co. v. *Kavanagh,* 295 U. S. 56, 79 L. ed. 1298.

II.

Section 86A of the Local Improvement Act is unconstitutional and void because it sets up unreasonable and arbitrary classifications and so deprives Objector of equal protection of the laws.

The Sturges & Burn Manufacturing Co. v. *Pastel,* 301 Ill. 253.

The People v. *Jacob Seemann,* 302 Ill. 538.

The Michigan Millers Mutual Fire Insurance Co. v. *McDonough,* 358 Ill. 575.

Binney v. *Long,* 299 U. S. 280.

ARGUMENT.

I.

The 1933 amendment adding Section 86A to the Local Improvement Act impairs the obligation of contract and deprives bondholders of property without due process of law as it is applied to the case at bar.

The bonds issued to anticipate the collection of Bellwood Special Assessment 100 were issued in 1928. The bonds issued to anticipate the collection of the four other special assessments levied against the property were issued in 1928 or in earlier years. At the time all these bonds were issued no Statute existed in the State of Illinois permitting an extension of delinquent special assessment installments and a refunding of the special assessment securities issued to anticipate collection of the same. No bondholder or any group of hondholders had a right to come into the County Court and apply for extension of the installments and refunding of securities, replacing his bond with one of current date. If any enforcement proceedings to collect the special assessment installments such as foreclosure proceedings were instituted all delinquent special assessments of all the various warrant numbers due against a given piece of real estate could be foreclosed at the same time and a foreclosure sale if held would liquidate equally the liens of all of the different special assessments. In 1933 the legislature enacted Section 86A which seeks to give the right of extension of installments and refunding of securities to bondholders whether their bonds were issued prior to the effective date of the act or thereafter. In other words the Statute is retroactive. It has been held that

although the legislature may make a legislative enactment retroactive in its operation where the Statute expressly so indicates, still if the enactment seeks to confer any new rights or privileges upon any one class to the prejudice and detriment of another the enactment is unconstitutional as depriving such person of his property without due process of law and as impairing the obligation of contract.

In the case at bar the question then arises does Section 86A confer upon one class of bondholders any new rights to the detriment or prejudice of any other group of bondholders? The appellant respectfully submits to this Honorable Court that Section 86A does confer some new rights upon one group of bondholders to the positive detriment and to the impairment of obligation of the other groups of bondholders where there are numerous installments of several different special assessments due upon the same lot or group of lots and where by reason of concentrated holdings, only one special assessment is extended and its securities refunded. In the present case the facts show that the land involved is vacant and unimproved and that the special assessment installments delinquent and unpaid against the land are approximately double its present fair market value. It is very obvious, therefore, that the only manner in which such lots can be marketed and unfrozen would be through a wholesale liquidation proceeding involving taxes and special assessments due thereon. If it is permissible to extend the installments of only one assessment and refund the securities due thereon it places the bondholders under said extended assessment in a prior and preferred position with rights superior to the rights of the bondholders under the other and unextended and unrefunded special assessments. It makes their obligations pending, current obligations, as against the status of the others which are past due and delinquent. In the event of any liquidation proceeding such as a tax foreclosure which,

by nature of the circumstances involved in this case, is inevitable, extension under Section 86A makes it possible for the bondholders under Bellwood Special Assessment Number 100 to have a foreclosure sale which would completely liquidate the liens of all the other four special assessments due against the same property, leaving this property subject only to future installments of Bellwood Special Assessment Number 100. Such a liquidation would mean undoubtedly that bondholders under Special Assessment Number 100 would receive full payment of all installments of that special assessment not yet due at the time foreclosure was instituted. On the other hand, holders of bonds under the other four special assessment numbers would be affected most disastrously. In the first place a foreclosure sale would liquidate their liens completely; secondly, the proceeds of sale would be spread proportionately to all installments of all special assessments in the action so that even if the full value of the property were bid at the foreclosure sale each bondholder would receive only a fraction on the face amount of his bond in the liquidation. However, the sale being necessarily subject to future installments of Bellwood Special Assessment Number 100 as extended, the proceeds of sale would be considerably less than the fair cash market value of the real estate sold.

In fact, if the inevitable liquidation through foreclosure should come within the first one or two years following extension and refunding, if allowed, of Bellwood Special Assessment Number 100 it is very obvious from the facts and figures testified to in the lower court that the return to the bondholders under the unextended special assessments would be less than one cent per dollar on the par value of the bonds whereas the return on bonds of the Bellwood Special Assessment Number 100 as extended would be 80 or 90 cents per dollar par value.

If Section 86A is construed to permit an extension which so changes the comparative positions of the bondholders under the various special assessment installments due on a given group of lots, Section 86A gravely violates the constitutional rights of all persons who hold special assessment bonds payable out of the unextended special assessment installments, and makes their obligations in effect a second lien, reduces severely the amount which they can realize from the real estate subject to the several installments of their special assessment and thus deprive them of property without due process of law and impairs the obligation of their contracts, clearly in violation of Sections 2 and 14 of Article 2 of the Constitution of the State of Illinois and of Section 10 of Article 10 thereof and the 14th Amendment to the Constitution of the United States of America.

At the time the Municipality issued the bonds involved herein no provision whatsoever existed in the Statutes for extension and refunding. It was therefore immaterial to the purchaser whether he bought single bonds in scattered issues or whether he bought all of the bonds of an issue or of a maturity thereof. Had this statutory provision for refunding been in existence at that time it would be much more advantageous to purchase these bonds in blocks composed of one or more whole maturities, if the purchaser were to protect himself against the contingency of having other special assessments covering the same property, through such refunding, and foreclosure, endanger the primary security behind his bonds. With the passage of the refunding statute and the attempt to refund and extend Bellwood Special Assessment Number 100, the bondholders under other special assessments on this same property and in particular the Objector in this case, *find themselves facing a set of conditions which were not possible under the law when their bonds were issued* and so

now find themselves with the obligations and covenants on which they relied at the time of purchase, altered and the rights under their contract dangerously impaired.

The case of *Friedman* v. *City of Chicago* (374 Ill. 545) involved an amendment passed in 1939 to the Local Improvement Act. The court held in that case that if an amendment to the Statute, passed after the date of the issuance of special assessment bonds, creates new and additional rights which makes it possible for any bondholders or group of bondholders to prejudice or detrimentally affect in any way the rights of other special assessment bondholders, that such Statute would be unconstitutional and void. Applying the law in the *Friedman* case to the case at bar it is clear that where a retroactive statute makes it possible to extend one of several special assessments, making its installments a current and prior lien and where, by reason of the restrictive provisions of the refunding act any holder of a single bond is refused access to the privilege of its provisions and is unable to have his bond refunded, the retroactive statute permitting extension creates an arbitrary discrimination, not before existing, and hence violates the constitutional prohibition on taking property without due process and impairs the obligation of contract. Such statute must therefore be held unconstitutional and void.

In the cases of *Scribner* v. *Village of Downers Grove,* 372 Ill. 614 and *Village of Downers Grove* v. *Harley,* 372 Ill. 586, the court held that an order under Section 86A of the Local Improvement Act, the section involved herein, cannot be entered if the order prejudicially affects in any way the vested rights of other bondholders. In the *Harley* case on page 589 the court says:

> "* * * section 86a, *supra,* must be construed so that the refunding of part of the installments will not be made in such a manner as to deprive any bondholder

of a vested right. It seems reasonably clear that it was the intention of the legislature in the enactment of section 86a of the Local Improvement Act to authorize all or part of the installments of a special assessment to be refunded, *provided that all the remaining bonds have been paid or not prejudicially affected in any way by the refunding of a part of the installments.*" (Italics ours.)

The *Harley* case involved a proceeding to extend six of the installments of a given special assessment leaving four other installments unextended. The situation is directly analogous to the present case where all of the installments of Special Assessment Number 100 are sought to be extended, leaving four other special assessments unpaid and unextended.

The case of *Scribner* v. *Village of Downers Grove, supra,* was, like the *Harley* case, a proceeding to extend certain installments of a certain special assessment leaving other installments unextended. In discussing the question of whether or not Section 86A was only a remedial act and was therefore not subject to the charge of unconstitutionality on the grounds that it did not impair substantive rights of bondholders but only the remedy the court held the act to be analogous to an act passed by the State of Arkansas which the United States Supreme Court held unconstitutional on the ground that the change of remedy under the Statutes involved so vitally affected the rights of the parties that the change in remedy could be considered an impairment of the substantive rights of the parties and the Statute was therefore unconstitutional. The court also says in reference to Section 86A in the *Scribner* case at page 621:

"It is evident that the legislature did not intend to confer upon the village power to refund these install-

ments in such a manner as to deprive any bondholder of his vested rights."

Appellant respectfully submits that in this case to permit the extension of Bellwood Special Assessment Number 100 does vitally affect the vested rights of the bondholders under the unextended special assessments for the reasons hereinabove shown; that therefore the words of the court in the *Harley* and *Scribner* cases, *supra*, hereinabove quoted should be applied to the case at bar and the Section 86A of the Local Improvement Act held invalid.

The Supreme Court of the United States also affirms this doctrine in the case of *W. B. Worthen Company, Trustee* v. *Kavanagh, Trustee,* reported in 295 U. S. 56 in the year 1935. The facts in this case were as follows: In 1930 bonds secured by benefit assessments levied against real estate were issued by the assessment trustees under the Statute as then existing of the State of Arkansas. The Statutes in 1930 provided for prompt foreclosure in the event of default on the bonds and outlined the method and procedure in such foreclosure. In March of 1933 the legislature of the State of Arkansas enacted three statutes radically changing the foreclosure procedure, lengthening the time involved therein, decreasing the amount chargeable for expenditure and in several other ways impeding the speedy realization on the security in the event of a default in the payment of the bonds. Certain bonds being in default a foreclosure was instituted by a Trustee and some of the bondholders under the old act. A foreclosure decree was entered under the terms of the new act and the plaintiffs appealed challenging the constitutionality of the new acts and alleging they were entitled to foreclosure under the Statutes as they existed at the time the bonds were issued. The Supreme Court of the United States upheld this contention, held the Statutes unconstitutional as impairing obligation of

contract and ruled that plaintiffs were entitled to foreclosure under the Statutes as they existed at the time the bonds were issued. The court said, "at the execution of the bonds and mortgages the Statutes of Arkansas contained provisions well planned to make these benefit assessments acceptable security," and goes on to say later in the opinion that "Not even changes in remedy may be pressed so far as to cut down security of a mortgage without moderation or reason or in a spirit of oppression. Even when public welfare is invoked as an excuse such bounds must be respected." The court went on to say that the 1933 enactments so restricted the terms of foreclosure that "active bidding at the sale is made virtually impossible."

The case is directly analogous to this one. At the time of the execution of the bonds in question the Statutes of Illinois contained no provisions which would render bonds sold individually or in small blocks as questionable security whereas the Statute later enacted puts such bonds at such a disadvantageous position that they become, under such Statute, very questionable security. In the event of a foreclosure of the special assessment liens the changes in the Statutes caused by the enactment of Section 86A would cause such conditions that, just as in the *Worthen* case, "active bidding at the sale is made virtually impossible."

II.

Section 86A of the Local Improvement Act is unconstitutional and void because it sets up unreasonable and arbitrary classifications and so deprives Objector of equal protection of the laws.

The 14th Amendment to the Federal Constitution prohibits any state from denying to any person the equal protection of the laws. Section 22 of Article 4 of the Con-

stitution of the State of Illinois prohibits the passage of special legislation or granting special privilege to any person. It has been repeatedly held by this court that where a Statute sets up an unreasonable and arbitrary classification, it will be held unconstitutional; that all classifications must be based on a real and substantial difference having a rational relation to the subject matter of the legislation. Section 86A hereinabove set forth provides in part:

> "Any municipality that has issued securities . . . shall upon petition of *Seventy-five per cent of the holders* of any securities issued against any assessment or any installment or installments thereof addressed to the corporate authorities of such municipality, adopt an ordinance directing and providing for the extension of the time of payment of the assignment or any of the installments thereof . . ." (Italics ours.)

To require a majority of 75% of the holders of outstanding securities to join together in a petition to the Municipality as a condition precedent to extension and refunding is an arbitrary, unreasonable and discriminatory exercise of legislative power. In the case at bar the evidence shows that the holdings of Special Assessment Number 100 are concentrated in one owner and that the ownership of some of the other special assessments due upon the same property is scattered. Under the Statute involved herein holders of other special assessment bonds may not even commence proceedings for extension and refunding unless three-fourths of them will join together at the very start and petition the Village for the same. This is obviously unfair to the Objector herein and to all other bondholders under the other unextended special assessments and deprives them, as a practical matter, of any possibility of making equal use of the same statute in effecting an exten-

sion and refunding so that they might establish their bonds on an equal position with the bonds of Special Assessment Number 100 as extended and refunded.

There is no reasonable and logical basis to assume that in order to complete an extension it should be necessary to commence with 75% of the outstanding bonds. There are many instances where bondholders will refuse to initiate any action on the grounds that it might subject them to burdens of time and expense, whereas if the extension proceeding could be commenced by one or a few of the scattered bondholders, and the only thing remaining for other bondholders to do would be to deposit their bonds in some depository named by the court for the purpose of exchanging them for new and current obligations, this proceeding might be successfully followed in innumerable special assessments. In the case of *Michigan Millers Mutual Fire Insurance Company* v. *McDonough*, 358 Ill. 575, the court held a certain section of the Fire Marine and Inland Navigation Insurance Act invalid as unlawfully discriminating against foreign insurance companies and says at Page 585:

> "To avoid falling within the constitutional inhibition of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the Statute."

In the case of *People* v. *Seemann*, reported in 302 Ill. 538, the court says at Page 547:

> "A distinction in legislation is not arbitrary if any set of facts can reasonably be supposed to sustain it, but it must rest upon a reasonable basis, and a classification is not valid which has no reasonable basis but is essentially arbitrary."

The Illinois Supreme Court affirmed the same principle again in the case of *Sturges and Burn Manufacturing Company* v. *Pastel,* 301 Ill. 253, where it held unconstitutional an Act of 1893 with reference to imprisonment of a defendant after jury trial and exempted from imprisonment defendants who defaulted, plead guilty or confessed judgment. The court ruled such a distinction an arbitrary discrimination between different classes of litigants and was a denial of the equal protection of the laws within the meaning of the Constitution of the United States and of the State of Illinois.

The Supreme Court of the United States also has affirmed this doctrine many times as in the case of *Binney* v. *Long,* 299 U. S. 280. In this case a succession tax law of the State of Massachusetts was held unconstitutional as repugnant to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States for the reason that it selected an arbitrary date, to-wit: September 1, 1907 and provided that succession to property under conveyances made prior to that date were taxable and succession under conveyances thereafter were not. The succession tax law containing such provision was enacted in 1909.

Certainly such arbitrary classifications and discriminations are no more unreasonable than the provision of Section 86A which requires a petition of 75% of the bondholders before any steps can be taken for the extension and refunding of their special assessment bonds.

CONCLUSION.

It is respectfully submitted that the County Court of Cook County erred in allowing the extension of special assessment number 100 of the Village of Bellwood and refunding the securities issued thereunder and in not finding that Section 86A deprived Objector without due process of law and impaired the obligation of the bonds owned by the Objector; and in not holding that Section 86A of the Local Improvement Act was unconstitutional and void, has deprived the Objector of the equal protection of the law and in denying that the petition of the Village of Bellwood for such extension and refunding; that the Supreme Court of the State of Illinois erred in affirming the decree of the County Court of Cook County and in not finding that Section 86A was unconstitutional and void; that Section 86A violates the Federal Constitution and as such should be held invalid and void.

It is, therefore, respectfully submitted that a Writ of Certiorari should issue in the above entitled cause to the Supreme Court of the State of Illinois.

Respectfully submitted,

JOHN F. VOIGT,
Counsel for the Petitioner.

MARSHALL S. HOWARD,
Of Counsel.

APPENDIX.

Text of Illinois Refunding Statute.

EXTENDING TIME FOR PAYMENTS OF ASSESSMENTS—REFUNDING BONDS.) 86a. The court having jurisdiction of the original assessment proceeding is hereby authorized at any time after the assessment has been confirmed to extend the time of the payment of assessments, or any installment or installments thereof, whether due or not due, heretofore or hereafter levied, and in case securities have been issued, to refund the securities and past due interest thereon, heretofore or hereafter issued in anticipation of the collection of the assessments or any installment thereof levied under the provisions of this Act, or any part thereof, and the past due interest thereon, (unless such past due interest be waived). In cases where no securities have been issued, the provisions of this section as to refunding securities shall not apply but the court shall, on petition of the municipality, have jurisdiction to extend the time of payment of the assessment. Securities not due may be refunded only when the holders thereof surrender the same in exchange for refunding securities issued in lieu thereof, or deposit the same as hereinafter provided and agree to accept payment therefor in cash in an amount not exceeding the par value thereof, together with accrued interest; said payment thereof is to be made out of the proceeds of the sale by the municipality of said refunding securities; provided that all the securities against any installment to be refunded shall be so surrendered or deposited. The court is hereby vested with authority to divide any assessment or any install-

ment or installments thereof into a greater number of installments than was originally provided for in the order confirming the assessment and to fix the amount of each installment, if, in its judgment, such re-division into a greater number of installments is for the best interest of all parties concerned. Whenever it is desired to extend the time of payment of any assessment or any of the installments thereof and issue refunding securities as in this Act provided any municipality that has issued securities in anticipation of the collection of special assessments levied under "An Act Concerning Local Improvements," approved June 14, 1897, as amended, shall, upon petition of seventy-five per cent of the holders of any securities issued against any assessment or any installment or installments thereof addressed to the corporate authorities of such municipality, adopt an ordinance directing and providing for the extension of the time of payment of the assessment or any of the installments thereof and the sale and exchange of refunding securities in anticipation of the collection of the special assessment or any of the installments thereof the time of payment of which is to be extended. The ordinance so adopted shall direct the filing of a petition in the court having jurisdiction of the original assessment. In the ordinance, the municipality shall establish a date of issue of such refunding securities and such date of issue shall be also the date from which interest on said refunding securities shall run and from which interest on the assessment so extended shall run. The ordinance for such refunding shall refer to the original assessment proceeding and no estimate or recommendation by the Board of Local Improvements shall be required. The court shall hear the proceeding in a summary manner without a jury and there shall be no hearing on benefits or on any legal objections not arising subse-

quent and incidental to the proceeding herein provided for. No judgment confirming any proceeding under this Act shall be entered until all outstanding securities shall have been either deposited in the court or with some depository under an escrow agreement approved by the court. The petition shall set forth the amount of the assessment or installments to be extended, the date or dates of confirmation of the original assessment, the rate of interest of the original assessment, the amount of cash on hand in the particular assessment or installments, the outstanding securities or other obligations to be refunded, the date of maturity of the outstanding securities and the rate of interest same bears. Such petition shall also state that the holders of the securities issued in anticipation of the collection of said assessment or installments, will surrender their securities in exchange for refunding securities to be issued under the provisions of this Act, or accept in payment thereof an amount not exceeding the par value thereof, with accrued interest thereon; and such petition shall also state what assessment or installments thereof are desired to be refunded, the desired maturity and the rate of interest of the extended installments, and the maturity, amount and rate of interest of the refunding securities sought to be issued. Accompanying such petition there shall be filed an assessment roll setting forth a description of the lots, blocks, tracts and parcels of land assessed in the original proceedings, the total amount of the unpaid installments, and the interest thereon proposed to be extended against each tract, the amount, number and due date of each installment of the proposed extended assessment. The judgment of the court confirming said refunding assessment shall be final and conclusive upon all parties and no appeal therefrom or writ of error thereto shall be collected in the same manner as the original assessment.

When said petition is filed the same shall be presented to the court and if found to be in proper form the court shall set the same for hearing at such date as will enable the clerk of the court to give at least ten (10) days notice of the hearing thereon, and it shall be the duty of the clerk to cause a notice to be published in some secular newspaper of general circulation within the County wherein the original assessment was confirmed. Said notice shall set forth the filing of the petition, the docket and warrant number of the assessment and the installment or installments thereof proposed to be extended and the number of installments in which it is proposed to divide the extended assessment. Said notice shall also state when and where the court will hear objections to such petition, the publication of which notice shall be at least ten (10) days prior to the date set for hearing, and the clerk shall also cause at least one copy of such notice to be posted in each of at least five (5) public places in the neighborhood of the improvement at least ten (10) days prior to the date set for such hearing. At such hearing the court may extend the time of payment of one or more installments of said assessment, change the number of installments in which said assessment or installments are divided, and subject to the provisions of this Act, provided for the details of the issuance of the refunding securities, in accordance with the prayer of the petition, and enter an order confirming the assessment as extended. Any property owner may pay the original assessment or any installments to be extended within ten (10) days after the entry of such order. Upon the expiration of ten (10) days after the entry of such order the municipal authorities shall issue the refunding securities authorized by order of court, provided the delivery of the refunding securities shall be simultaneous with the surrender of the securities to be refunded or paid. The securities so sur-

rendered shall be immediately cancelled. The collection and payment of the extended assessment(s) and the securities issued hereunder shall be in manner as now provided by law.

Assessments and installments, the time for the collection of which has been extended, shall continue to be a lien on the lands assessed the same as the original assessment and the refunding securities issued under the provisions of this Act shall be payable therefrom.

Whenever the refunding of securities and the extending of the time of payment of any assessments or installments thereof include assessments or installments past due and such assessments or installments or any part thereof have been returned delinquent, withdrawn or forfeited as provided by law, the court shall in and by the order extending the time of payment and authorizing the refunding of the securities, order the County Collector to withdraw said assessments or installments from the delinquent list and order the proper officers to release all property forfeited or withdrawn on account of said assessments or installments, time of payment of which is to be extended, by the proper entry upon the tax sale and judgment record of said county. The county clerk shall charge such security holders a fee of thirty-five cents (35¢) for each service rendered by him in connection therewith.

All reference herein to statutes affecting the original proceedings shall refer to such statutes as are now in force or as may hereinafter be enacted. The use of the word "securities" shall be held to include bonds, coupons and vouchers, public benefit vouchers and warrants and accrued interest.

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JUN 27 1941
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. [redacted] 88

HUNTER AND CO., INC., an Illinois corporation,
Petitioner,

vs.

VILLAGE OF BELLWOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 1061.

HUNTER AND CO., INC.,
an Illinois corporation,
Petitioner,

vs.

VILLAGE OF BELLWOOD,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

Respondent, Village of Bellwood, deems it necessary for a proper understanding of the issues to state the following supplemental facts. Hunter and Company, Inc., petitioner, is not the legal owner of any property assessed in the original special assessment proceeding known as Bellwood Special Assessment No. 100. Arthur M. Hun-

ter, Secretary and Treasurer of Hunter and Company, Inc., testified that Cecil Whitehurst of Kansas City, Missouri, an associate, was the legal owner of lot 149 (Rec. 93). Lot 148 is owned by Mr. Hunter's wife, and the title appears in the name of Millicent Mary Price, which was the name of his wife prior to her marriage (Rec. 92). Both of these lots are vacant (Rec. 92). According to Mr. Hunter's testimony, the corporation had an interest in the profits to be derived. He was not sure but thought it was either fifty per cent (50%) or one-third (⅓) of the profits. Mr. Langworthy, Attorney for the Village, objected to this testimony on the ground that the contract was the best evidence to which the Court agreed (Rec. 82).

On cross-examination, Mr. Hunter testified that as a side line his company was in the business of servicing the property owners by purchasing bonds and paying the property owners' special assessment bills at a discount to them; that the bonds were bought at a discount by the company and the company made a profit on the transaction (Rec. 88-91).

Mr. Hunter stated that the coupons which the company held payable out of Special Assessment No. 41 had been cut from bonds that Hunter and Company, Inc., had purchased in the interests of certain taxpayers, and surrendered to the Village in payment of installments of Assessment No. 41 (Rec. 84). The Village of Bellwood did not allow Hunter and Company, Inc., to surrender and cancel the $30.00 in interest coupons (Rec. 83-84). $174.00 of interest coupons, payable out of Special Assessment No. 51896, were likewise cut from bonds that Hunter and Company, Inc., had surrendered in payment of certain property owners' special assessments in that proceeding (Rec. 85). $180.00 worth of

coupons payable out of Special Assessment No. 89 were likewise detached from bonds applied in payment of certain property owners' assessments in that proceeding (Rec. 87). Hunter and Company, Inc., owned $4,353.00 worth of interest coupons payable out of Special Assessment Warrant No. 60625, which coupons were also detached from bonds that had been applied in payment of certain property owners' assessments in that warrant (Rec. 87).

Hunter and Company, Inc., objector-appellant, filed no objections as an alleged property owner. The objections filed relate solely to Hunter and Company, Inc., as the owner of certain coupons and certain bonds payable out of special assessment warrants which are not involved in this proceeding. In our argument we shall state the objections which were presented in the trial court.

SUMMARY OF THE ARGUMENT.

I.

The 1933 amendment adding Section 86a to the Local Improvement Act does not impair the obligation of contract and deprive bondholders of property without due process of law.

1. The petitioner, Hunter & Company, Inc., prosecuted its appeal to the Supreme Court of the State of Illinois not as a property owner or as the owner of securities payable out of special assessment warrant 100, but as the owner of certain interest coupons and certain bonds payable out of special assessment warrants numbered 41, 51896, 89 and 60625.
2. Under the provisions of the Local Improvement Act of the State of Illinois each special assessment proceeding is separate and distinct from all others.
3. The holders of special assessment bonds made payable out of one proceeding have no right to the moneys collected in any other proceeding. Consequently, Hunter and Company, Inc., has no right, claim or interest in the funds collected in special assessment warrant 100.
4. Under Section 86a it is specifically provided that the court having jurisdiction of the original assessment proceeding is the only one in which the securities relating to that proceeding can be refunded.
5. Municipalities in Cook County as well as the Village of Bellwood have had special assessment proceedings confirmed not only in the County Court of Cook

County but also in the Circuit Court and Superior Court of Cook County. Consequently, it is obvious that the bondholders of an original assessment proceeding filed in a particular court cannot interfere with special assessment proceedings filed in other courts so as to refund all outstanding special assessment bonds in those proceedings.

6. If petitioner's contentions were followed, the refunding of bonds covering a single lot in one special assessment proceeding, if that same lot were assessed in another special assessment proceeding, might eventually, by reason of overlapping special assessment proceedings on the same lots in different special assessment districts, require the refunding of all the outstanding securities in every special assessment proceeding in the entire village.
7. The jurisdictional requirement of refunding special assessment bonds in the court having jurisdiction of the original assessment disproves petitioner's contention that all special assessment warrants relating to the same lot must be refunded since many of the special assessment proceedings are filed in different courts. The bondholders whose bonds are refundable in one court have no standing in another court.
8. The requirement that the holders of 75% of the bonds outstanding in any particular special assessment warrant must petition the municipality to refund special assessment bonds is a reasonable requirement because it indicates to the municipality sufficient bondholders are willing to refund so as to warrant corporate action.
9. The law is well settled in Illinois that the Legisla-

ture under the constitution has power to authorize cities and villages to refund a bond issue. (*Hoehamer* v. *Elmwood Park*, 361 Ill. 422, 430.)

10. The cases relied on by petitioner prove respondent's contention that the refunding of a special assessment is limited to the particular warrant or the installments of that warrant and cannot be extended to include other warrants.

II.

Section 86a of the Local Improvement Act is constitutional.

1. The provisions of Section 86a give bondholders in any special assessment proceeding the right to refund without discrimination.
2. The requirement that the holders of 75% of outstanding securities must petition a municipality to refund all of the installments of a special assessment warrant, or the holders of 75% of the securities in any one installment of such a warrant, is not arbitrary or an unreasonable classification.
3. The funding and refunding of outstanding securities by a certain number of the holders of such securities has been authorized under Federal bankruptcy acts and such legislation has met the approval of this Court.

ARGUMENT.

I.

The 1933 amendment adding Section 86a to the Local Improvement Act does not impair the obligation of contract and deprive bondholders of property without due process of law.

The petitioner, Hunter and Company, Inc., a corporation, and the only objector in the trial court to the extension of Bellwood Special Assessment Warrant No. 100, prosecuted its appeal to the Supreme Court of the State of Illinois, not as a property owner, but as the owner of $30.00 interest coupons payable out of Special Assessment Warrant No. 41, $174.00 interest coupons payable out of Special Assessment Warrant No. 51896, one bond having a balance due of $420.00 and $180.00 interest coupons payable out of Special Assessment Warrant No. 89, and one bond in the sum of $500.00 and interest coupons in the sum of $4,353.00, payable out of Special Assessment Warrant No. 60625 (Abst. 26).

Hunter and Company, Inc., owns no bonds or interest coupons payable out of Special Assessment Warrant No. 100.

The objections filed by Hunter and Company, Inc., in this proceeding to the refunding of the securities issued and made payable out of the original proceeding, briefly stated are these:

First: It is claimed that the proposed refunding plan is inequitable and unjust, and impairs the obligation of a

contract for the reason that if the refunding is granted, Hunter and Company, Inc., as a holder of coupons and bonds *in other special assesesment warrants,* and all of the other bondholders who have bonds and coupons payable out of *other special assessment warrants* will be put into a position subject and inferior to the lien of the refunded Special Assessment No. 100; that the holders of the bonds issued in the refunding of Special Assessment No. 100 will be put in a preferential position over and above bonds payable out of other special assessment funds in the Village, and would render worthless all of the other bonds.

Second: It is further urged that if Special Assessment Warrant No. 100 is refunded, the bondholders having bonds *in other special assessment warrants* have been deprived of their property without due process of law, and that the special assessment bonds owned by Hunter and Company, Inc., and all other holders of bonds *in other special assessment warrants* would have the obligations of these contracts impaired.

Third: It is claimed that the ordinance passed by the Village of Bellwood refunding Special Assessment Warrant No. 100 is unconstitutional and void because *other unpaid special assessment bonds in other special assessment warrants will still be outstanding and not refunded.*

Fourth: Finally, it is claimed Section 86a is unconstitutional and void because it requires the village board to pass refunding ordinances whenever 75% of the holders of the securities payable from any assessment or installment or installments of an assessment petition therefor. It is claimed the use of the percentage 75 is arbitrary and bears no relation to the matter dealt with in Section 86a.

The specifications of errors in petitioner's brief follow the foregoing objections. In order that this Honorable Court may be apprised of the nature of a special proceeding under the Local Improvement Act of the State of Illinois a consideration of the fundamental rules laid down by the Illinois Supreme Court will be helpful. A special assessment has been defined by the Illinois Supreme Court to be distinguishable from a general tax in that it is assessed or levied for a special purpose and not for a general purpose. It is not a charge on property which reduces its value. The assessment is made in the ratio of advantages accruing to the property in consequence of the improvement. In no case can the assessment exceed the advantages accruing to the property assessed. It is, therefore, regarded but an equivalent or compensation for the increased value the property will derive from the improvement the assessment is levied to discharge. (*People* v. *Brewer Estate,* 362 Ill. 88, 91.)

The term "local improvement" confines a special assessment to a particular locality and solely to the property whose value is enhanced by the benefits obtained from such improvement. In the case of *Village of Glencoe* v. *Hurford,* 317 Ill. 203, the court, on page 206, stated the general rule as follows:

> "Where the improvement enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality, it is a local improvement."
>
> *Village of Glencoe* v. *Hurford,* 317 Ill. 203, 206.

So far as practicable, all property affected bears the burden of a local improvement equally, but this principle of uniformity and equality applies only to the property benefited by the local improvement and not to other property in the municipality. (*City of Chicago* v.

Smith, 310 Ill. 244, 245.) Corollary to this proposition is the rule that under the local improvement act property cannot be assessed more than it will be specially benefited; that the continuing test in special assessment proceedings, whether original or supplemental, is that the assessment shall not exceed the special benefit to the property assessed. (*Harmon* v. *Village of Arthur*, 309 Ill. 95, 98.)

The judgment in the original proceedings as to benefits on any piece of property stands *prima facie* as an adjudication of that question and conclusively as an absolute adjudication, if in the original proceeding it was specially found that the property would be benefited no more than the amount assessed against it. Under those circumstances, the judgment is *res judicata* on the question of benefits. (*City of Nokomis* v. *Zepp*, 246 Ill. 159, 166.)

Of equal significance is the effect which a judgment of confirmation has upon the property assessed. Under Section 56 of the Local Improvement Act it is specifically provided:

> "Such judgments shall have the effect of several judgments as to each tract or parcel of land assessed, * * *.
>
> "Such judgments shall be liens on behalf of the municipality making the improvement, for the payment of which said special tax or special assessment is levied, on the property assessed from the date thereof, to the same extent and of equal force and validity as a lien for the general taxes until such judgments are paid or the property against which any such judgment is entered is sold to pay the same."
>
> Illinois Revised Statutes (1939), Chap. 24, Par. 758, Sec. 56.

In discussing the matter of a special assessment proceeding and that such proceeding is limited solely to the property assessed, the court, in the case of *City of Chicago* v. *Partridge*, 248 Ill. 442, on page 453, stated the following:

> "In a special assessment proceeding a personal liability cannot be imposed upon the owner of property benefited by a local improvement. The purpose of the proceeding is to impose a burden or charge upon the property itself, which, if not removed by the owner, is to be satisfied by a sale of the property under authority conferred by law. Such proceeding is therefore denominated a proceeding *in rem*, meaning a proceeding against the property itself, as distinguished from a proceeding *in personam*, meaning a proceeding against the owner of the property. The *res*, however, is not the street to be improved but is the property upon which it is sought to place the burden or charge, and if all the essential steps provided by statute have been taken, a judgment entered therein, either confirming an assessment against the *res* or sustaining objections and dismissing the petition as to the *res*, is conclusive, so far as the *res* is concerned, against the whole world as to all matters determined in that proceeding. It is, however, always the judgment entered in a cause which constitutes the estoppel, and as the judgment entered in a special assessment proceeding is, in effect, a several judgment as to each tract or parcel of land assessed, it necessarily follows that, in so far as the judgment is concerned, each tract or parcel of land assessed is a sperate *res*, and that there is, in effect, a several judgment *in rem* as to each tract or parcel of land assessed; *and as the judgment of confirmation against one tract is in nowise affected by the reversal of that judgment as to another tract, or by a judgment entered in the same proceeding sustaining objections and dismissing the petition as to such other tract, it also necessarily follows that the judgment entered in the proceeding sustaining objections and dismissing the proceedings as to one tract cannot be successfully*

interposed as an estoppel or bar to an assessment against another tract in a subsequent proceeding." (Italics ours.)

Chicago v. *Partridge*, 248 Ill. 442, 453, 454.
Phelps v. *Mattoon*, 177 Ill. 169, 170.

It is manifest that under the law in Illinois, each special assessment proceeding is separate and distinct; that only the property assessed is involved and the assessments to be paid, for a particular improvement, are in no way dependent upon or correlated to other special assessments that may have been levied against the same property. In determining whether the property to be assessed is benefited to the extent of the assessment levied, it is proper to consider other improvements, and the cost of other improvements, whether constructed or to be constructed in determining the amount which the property would be benefited by the improvement involved. (*Village of DesPlaines* v. *Winkelman*,270 Ill. 149, 156.) Thus the assessment against any one piece of property cannot exceed the benefit that that property derives from the improvement after having considered all proper elements. The assessment, therefore, upon confirmation is conclusive and is not subject to collateral attack. (*People* v. *Brewer Estate*, 362 Ill. 88, 92; *Fox* v. *Maxwell*, 353 Ill. 172, 179.)

Furthermore, Section 86a of the Local Improvement Act specifically states:

"The ordinance for such refunding shall refer to the original assessment proceeding and no estimate or recommendation by the Board of Local Improvements shall be required. The court shall hear the proceeding in a summary manner without a jury *and there shall be no hearing on benefits* * * *." (Italics ours.)

Illinois Revised Statutes (1939), Chap. 24, Par. 792a, Sec. 86a.

In the instant case, Hunter and Company, Inc., as objector, attempted to have the County Court in this proceeding, involving the refunding of Special Assessment Warrant No. 100, go into the question of comparative assessments made in the four other proceedings in which Hunter and Company hold bonds. This, obviously, the County Court properly refused to do because it was in effect an attempt to reconsider the question of benefits—not only in the assessment being refunded, but in four extraneous proceedings.

The petitioner asserts the unpaid amounts of the four special assessments, in which petitioner claimed to hold securities, roughly equal the amount of unpaid assessment No. 100, as to the average lot against which the assessments were levied. Other statements of fact are asserted by petitioner based upon the testimony of the witness, Hunter. Witness Hunter testified further that the average lot was worth from five hundred to seven hundred fifty dollars (Tr. 29) but admitted that he had previously testified that a part of the property was worth a hundred dollars a foot (Tr. 29). The four assessments in which the petitioner claimed to own securities were 41, 89, 51896 and 60625. No competent evidence was offered by petitioner to support most of the conclusions asserted.

The proceedings involving No. 60625 were before the Supreme Court in the case of *Johnson* v. *Village of Bellwood*, 338 Ill. 605. Assessment No. 51896 is nearly ten thousand numbers less than No. 60625 and was for a sanitary sewer serving not only the property involved in Assessment No. 100, but all the property in the village both North and South of the district assessed in No. 100, an area at least five times as large, if not ten times as large. Assessment No. 60625, as appears from

the opinion in *Johnson* v. *Village of Bellwood, supra,* served nearly the entire village.

Assessment No. 89 was an electric light system which served almost all of the village west of the railroad while assessment No. 41 was for water main serving perhaps about four times as much property as is served by Assessment No. 100. There was no competent evidence submitted by petitioner of the actual unpaid installments in any of these four assessments and what property, if any, in the assessment district affected by Assessment No. 100 is now delinquent in connection with the four assessments. No doubt a number of lots now delinquent in the district included in assessment No. 100 are also delinquent in some other assessments. No doubt some of the delinquent lots are also delinquent in payment of general taxes.

It seems to be petitioner's contention that Section 86a requires the refunding of *all* special assessment warrants where assessments have been levied upon the same property. Appellant argues that if the court construes Section 86a to permit the bondholders in one special assessment warrant to refund without compelling the bondholders in that specific warrant to refund at the same time all other special assessment warrants levied against the same property, a preference will be given the bondholders who are refunding the one wararnt over bondholders who are not refunding other warrants. In other words, if we carry petitioner's idea to an ultimate conclusion, it would mean that bondholders who, under the provisions of Section 86a, sought a refunding of particular bonds in a special assessment warrant, would be required under certain circumstances to refund every special assessment proceeding in a village or city.

For example, if Lot "A" was assessed in the original

Special Assessment proceeding No. 100 and was also assessed in the original Special Assessment proceeding No. 60625, but happened to be the only lot assessed in the district involving Special Assessment No. 60625, then both proceedings, according to petitioner's contention, would have to be refunded by the bondholders having bonds only in Special Assessment proceeding No. 100. Let us assume further that Lot "B" in No. 60625 happened to be the only lot assessed in the district involving Special Assessment proceeding No. 41, and Lot "C" assessed in Special Assessment proceeding No. 41 the only lot assessed in Special Assessment No. 45, it is obvious that if all of these different districts representing different special assessment proceedings had to be refunded by the holders of bonds in Special Assessment No. 100, because Lot "A" happened to be the only lot assessed in Special Assessment proceeding 60625, the refunding of a single Special Assessment proceeding might easily be extended to include all of the special assessments of the Village. We submit that no reasonable construction of Section 86a would contemplate the results and confusion attending petitioner's interpretation of Section 86a.

The payment of one special assessment on a designated piece of property has nothing to do with an assessment levied against the same property under a different proceeding. Section 86 of the Local Improvement Act authorizes the issuance of bonds for the purpose of anticipating the collection of the second and succeeding installments to pay for the cost of the construction of the improvement for which the proceeding had been filed. It is specifically provided in Section 86:

> "Each bond shall state on its face out of which installment it is payable, and shall state, by num-

ber or other designation, the assessment to which such installment belongs. The principal of such bonds shall not exceed, in the aggregate, the amount of such deferred intsallments, and shall be divided into as many series as there are deferred installments * * *."

The Illinois Supreme Court and the Appellate Court of Illinois have construed this Section to mean that the installments are the only source of payment of the bonds, and when they are collected by the municipality the money received becomes a trust fund for the payment of the bonds to the holders, without preference among them. (*Rothschild* v. *Village of Calumet Park*, 350 Ill. 330, 339.) A village is not authorized to use the moneys collected in one installment for any purpose except to pay the honds issued against that installment, with interest thereon (*Bankers Life Company* v. *Village of Elmwood Park*, 280 Ill. App. 524, 526). Obviously, the only bondholders having any interest in a special assessment proceeding *are those who hold bonds payable out of the installments of such a special assessment warrant.*

There is nothing in the Local Improvement Act which provides, and it was never contemplated, that the holders of bonds payable out of one special assessment warrant have any interest in the proceeds or funds collected in another special assessment proceeding. Any surplus accruing in any warrant under the provisions of Section 86 are available for the payment of any bond or voucher payable out of an installment in the particular warrant where sufficient moneys have not been collected to pay such vouchers or bonds. And Section 93 provides that if, upon final settlement with the contractor for any improvement and full payment of all vouchers or bonds, issued on account of such contract, there shall be any surplus remaining in such special assessment, it shall be

the duty of the proper authorities of the municipality to at once cause a rebate to be declared upon each lot, block, tract or parcel of land assessed of its *pro rata* proportion of such surplus. *Consequently, Hunter and Company, Inc., appellant, who have no bonds or coupons payable out of any of the installments of Special Assessment Warrant No. 100, is in no way interested in or deprived of any rights by reason of the refunding of Special Assessment Warrant No. 100.*

Both from a legal and factual consideration is it apparent that the general provisions of the Local Improvement Act contemplated each special assessment proceeding to be independent of any and all other special assessment warrants and the provisions of Section 86a confirm this to be true. At the very outset, Section 86a provides:

> "*The court having jurisdiction of the original assessment proceeding* is hereby authorized at any time after the assessment has been confirmed to extend the time of payment of assessments, or any installment or installments thereof, whether due or not due, heretofore or hereafter levied, and in case securities have been issued, to refund the securities and past due interest thereon, heretofore or hereafter issued in anticipation of the collection of the assessments or any installment thereof levied under the provisions of this Act, * * *." (Italics ours.)

The foregoing provision is jurisdictional. Consequently, a refunding proceeding can only be had in the court, where the original assessment proceeding was confirmed. If petitioner's contentions as to the refunding of all special assessment warrants which may have been assessed on one or more pieces of property in different special assessment proceedings were to prevail, then a jurisdictional question would immediately arise inasmuch as it is well known that municipalities very often have

assessments confirmed on the same property by filing proceedings in different courts. This Court will take judicial notice of the fact that municipalities in Cook County for many years past have had special assessments confirmed in the County Court of Cook County as well as in the Circuit Court and Superior Court of Cook County. (See *Village of Bellwood* v. *Galt*, 321 Ill. 504.) While in the instant case the special assessment proceedings in which Hunter and Company, Inc., holds certain coupons are proceedings which were confirmed in the County Court of Cook County, yet if Section 86a were construed, as maintained by petitioner, to require the refunding of all special assessment warrants, the impossibility of such refundings where the original proceedings were filed in different courts is manifest in view of the jurisdictional requirement that refunding must be had in the court that confirmed the original assessment. Furthermore, the seventy-five per cent (75%) of the holders of any securities issued against any assessment or any installment or installments thereof, seeking the refunding of securities in anticipation of the collection of the special assessment or any of the installments thereof, the time of payment of which is to be extended, as required by Section 86a, *can refer only to the bondholders of an original assessment proceeding, filed in a particular court, and not to all special assessment proceedings, some of which may have been filed in different courts.* The bondholders whose bonds are refundable in one court would have no standing in another court.

Section 86a does not deprive Hunter and Company, Inc., or any other bondholder, from petitioning the municipality for a refunding of the special assessments in which they are interested. Petitioner claims that to require a majority of seventy-five per cent (75%) of the

holders of outstanding securities to join in a petition to the municipality as a condition precedent to extension and refunding is an arbitrary, unreasonable and discriminatory exercise of legislative power and, therefore, unconstitutional. However, petitioner, in support of its argument, on page 18 of its brief, states the following:

> "There are many instances where bondholders will refuse to initiate any action on the grounds that it might subject them to burdens of time and expense, whereas if the extension proceeding could be commenced by one or a few of the scattered bondholders, and the only thing remaining for other bondholders to do would be to deposit their bonds in some depository named by the court for the purpose of exchanging them for new and current obligations, this proceeding might be successfully followed in innumerable special assessments."

If Section 86a provided what petitioner suggests, and compelled bondholders, unwilling, to give up their old bonds in exchange for new refunding bonds, it undoubtedly would be unconstitutional not only on the grounds of impairing the obligations of a contract, but for taking a person's property without due process of law. As it is, Section 86a not only requires a petition of seventy-five per cent (75%) of the holders of the bonds in any particular special assessment warrant before a municipality is obliged to act, but it also provides that *"No judgment confirming any proceeding under this Act shall be entered until all outstanding securities shall have been either deposited in the court or with some depository under an escrow agreement approved by the court."* In other words, Section 86a in its provisions carefully protects all of the bondholders having bonds in the special assessment warrant that is being refunded. No single bondholder, not even a small minority, can compel the bondholders to give up their bonds, as suggested by peti-

tioner. Section 86a virtually requires the consent of all bondholders of a particular special assessment warrant being refunded to consent to such refunding. Since, under the provisions of Section 86a, a bondholder having an interest in the refunding proceeding has no cause to complain and his rights are fully protected by the law *a fortiori*, a person who owns no bonds in the warrant and has no rights in the proceeding certainly has no reason for claiming the section to be unconstitutional.

> "One has no constitutional right to a 'remedy' against the lawful conduct of another."
>
> *Senn* v. *Tile Layers' Protective Union Local No. 5*, 301 U. S. 468, 483; 57 Sup. Ct. Rep. 857, 864.

Petitioner complains that the refunding of Bellwood Special Assessment No. 100 gives the holders of the refunded bonds a preferential position over the holders of bonds in other special assessment warrants; that Section 86a therefore confers new rights upon one group of bondholders to the positive detriment and to the impairment of obligation of the other groups of bondholders where there are numerous installments of several different special assessments due upon the same lot or groups of lots, and where, by reason of concentrated holdings only one special assessment is extended and its securities refunded. The contention made in support of this statement is that under the doctrine that the later year's tax constitutes a prior lien, the refunding in this proceeding establishes the lien of Bellwood Special Assessment No. 100 as a first and prior lien and thereby subordinates the lien of all of the other special assessment installments to it. This contention has been decided adversely to petitioner in the case of *People* v. *Taylorville*, 371 Ill. 280, 286-287.

From what we have already said, it is obvious that Section 86a does not confer new rights upon one group of bondholders to the detriment of others. The right to refund is common to all bondholders. Not only does Section 86a permit the refunding of an entire special assessment warrant, but it also permits the refunding of "any assessment or any installment or installments." Under this provision, bondholders of a single installment of any special assessment warrant have the right to have that installment refunded even though the holders of bonds in the other installments decline to join such refunding proceeding. This provision of Section 86a minimizes within reasonable bounds the difficulties that bondholders may have in seeking the refunding of a special assessment warrant.

Petitioner contends further that at the time the Village of Bellwood issued the bonds involved in this proceeding, no provision whatsoever existed in the statutes for extension and refunding of these assessments. Counsel for petitioner argues that because no refunding statute existed, it was immaterial to a purchaser whether he bought all of the bonds of a single issue. And, he adds, if there had been statutory provision for refunding bonds, such purchaser may have made his purchases with a view to protecting himself against the contingency of having other special assessments covering the same property endanger the bonds he held as a primary security by either refunding or foreclosure proceedings. There was no showing in the County Court that petitioner purchased his bonds and coupons prior to the effective date of Section 86a. This contention is highly speculative. We have already pointed out that under the law any bonds, whether purchased singly or all the bonds of an issue, the value of such bonds have in no way been impaired by the enactment of Section

86a. The fact that petitioner's bonds may have gone into default and that a foreclosure proceeding may be imminent does not in any way militate against the right of the legislature to provide during a period of economic distress for the refunding of such securities in order to aid the property owner in meeting his future payments. The Illinois Supreme Court, in the case of *Hoehamer* v. *Village of Elmwood Park,* 361 Ill. 422, on page 430, stated:

> "The refunding of a municipal debt is not a new thing in this State, and it is well settled that the legislature, under the constitution, has power to authorize cities and villages to refund a bond issue. The right of the legislature to pass the Local Improvement act empowering municipalities to issue improvement bonds is not questioned. Since the power to issue bonds exists, it must necessarily follow that the legislature has power to authorize a municipality to refund those bonds when, through an economic depression or otherwise, they are in default."
>
> *Hoehamer* v. *Elmwood Park,* 361 Ill. 422, 430.

The fact that Section 86a authorizes the refunding of special assessment bonds does not impose any new rights on one group of bondholders to the disadvantage of others. The authorization to refund is delegated to the municipality and can be acted upon only under the conditions as prescribed by Section 86a. Its conditions appertain to the voluntary acts of all of the bondholders interested in a particular special assessment proceeding. The rights under Section 86a are accorded to all bondholders alike. Therefore, whether the purchaser owns only one or all of the bonds of a particular issue, his rights are coextensive with all other bondholders, and he cannot be compelled under the provisions of Section 86a to do anything contrary to his own wishes. To this extent, Section 86a has jealously guarded the interest of the minority, and there is nothing in the Section which forces the will of the majority upon the minority, or even a single bondholder.

Counsel for petitioner refers to the case of *Friedman* v. *City of Chicago*, 374 Ill. 545. The opinion handed down by the court in no way has any application to the issues raised in this matter. Counsel cites the case on the proposition "that where a retroactive statute makes it possible to extend one out of several special assessments, making its installments a current and prior lien and where, by reason of the restrictive provisions of the refunding act any holder of a single bond is refused access to the privilege of its provisions and is unable to have his bond refunded, the retroactive statute permitting extension creates an arbitrary discrimination, not before existing, and hence violates the constitutional prohibition on taking property without due process and impairs the obligation of contract. Such statute must therefore be held unconstitutional and void." (Petitioner's brief, page 13.)

The foregoing statement is obviously a distortion and misconception of Section 86a as well as the facts involved in the present matter. It is a general rule of law, as cited in Corpus Juris, Vol. 12, par. 778, p. 1084, that a statute is not retrospective merely because it relates to antecedent transactions, where it does not change their legal effect. While it is true that Section 86a relates to antecedent transactions such as the original special assessment proceeding, it does not, however, change the legal effect of the original proceeding nor does it change the effect of the obligations issued in the form of bonds. Section 86a permits the extension of the time of payment of the installments out of which the original bonds were payable by extending the time of payment of those installments and by issuing refunding bonds in lieu of the original, with no greater rights and with no different security from that of the original lien, but even this can be done

only by and with the consent of all the bondholders whose bonds are being refunded.

Counsel for petitioner cites the case of *Village of Downers Grove* v. *Harley*, 372 Ill. 586, quoting from that decision and italicizing the following words:

> "* * *, provided that all the remaining bonds have been paid or not prejudicially affected in any way by the refunding of a part of the installments."

Counsel for petitioner, after quoting the above words, concludes:

> "The *Harley case* involved a proceeding to extend six of the installments of a given special assessment leaving four other installments unextended. The situation is directly analogous to the present case where all of the installments of Special Assessment Number 100 are sought to be extended, leaving four other special assessments unpaid and unextended."

The fallacy of this contention is in the fact that in the *Harley case only one special assessment warrant was being refunded.* The special assessment involved was Downers Grove Special Assessment No. 123. What is said in the opinion of the Illinois Supreme Court in the *Harley case* confirms what we have heretofore stated with reference to the rights of bondholders in a particular special assessment warrant.

The *Harley case* is a sequel to the case of *Thayer* v. *Village of Downers Grove*, 369 Ill. 334. In the latter case, the County Court of DuPage County had confirmed a judgment extending payments of Special Assessment No. 123 for a period of fifteen years and directing the issuance of bonds redeemable within that time, and bearing interest at five per cent (5%), to replace bonds outstanding. *All of the bondholders had not joined in that particular proceeding.* Bondholders who had not partici-

pated in the proceeding made a motion to vacate the the judgment confirming the special assessments, as extended, on the ground that the judgment of confirmation had been procured by fraud and that the holders of seventy-five per cent (75%) of the bonds had not petitioned the Village Council, and further for the reason that not all of the bondholders were willing to deposit their bonds as the petition alleged. The County Court of Du Page County sustained the motion to vacate, and the Village of Downers Grove appealed. The Illinois Supreme Court, on appeal, affirmed the holding of the County Court to the effect that the refunding of Special Assessment No. 123 had not been in compliance with the requirements of Section 86a and, therefore, the County Court did not have jurisdiction to proceed; that a participation of all of the bondholders in the proceeding was necessary in order to make such proceeding valid.

When the *Thayer case* was remanded, the Village then attempted in the *Harley case* to refund those installments whose bondholders were willing to refund, and excluded the installments in which bonds were held by the objecting bondholders who had appeared in the *Thayer case*. However, in the *Harley case,* an attempt was made to apply the surplus accrued in installments, where all the principal and interest had been paid, to the installments which were being refunded, without applying *pro rata* the surplus on hand to the installments which were not being refunded. This the Court held could not be done.

In the case of *Scribner* v. *Downers Grove,* 372 Ill. 614, the Court held that the non-participating bondholders who were not interested in having the installments refunded out of which their bonds were payable, had a vested right in the surplus funds accruing in the warrant, and that to apply the surplus funds to only the installments that were being refunded was depriving the bond-

hodlders of a vested interest in those funds. *In the instant matter, Hunter and Company, Inc., has no vested right in the funds of Bellwood Special Assessment No. 100. Whatever rights it has relate solely to the respective warrants out of which its coupons and bonds are payable.* Neither the *Harley case* nor the *Scribner case* has any application to the instant matter, and, therefore, the language quoted by appellant from the *Harley case* has no bearing on the issue in this case.

Counsel for petitioner cites the case of *W. B. Worthen Company, Trustee* v. *Kavanaugh, Trustee*, 295 U. S. 56, in support of the proposition that "At the time of the execution of the bonds in question the Statutes of Illinois contained no provisions which would render bonds sold individually or in small blocks as questionable security whereas the Statute later enacted puts such bonds at such a disadvantageous position that they become, under such Statute, very questionable security." We respectfully submit that no results as stated by counsel are created by reason of the enactment of Section 86a. The Illinois Supreme Court, in the *Scribner case, supra*, considered the *Worthen Company case* and held that it had no application to a refunding under Section 86a in that the violation of the substantive rights complained about in the *Worthen Company case* were fully protected under the provisions of Section 86a. As heretofore mentioned, the Illinois Supreme Court approved in the *Hoehamer case, supra*, the enactment of Section 86a as a means to relieve property owners who, because of economic conditions, were unable to pay their assessments. The purpose of Section 86a was to avoid foreclosure of special assessment liens and to aid both the property owner and the bondholder. Petitioner is not deprived of these rights and it has the same opportunity to have the special assessment war-

rants refunded in which it is interested as do the bondholders who hold the bonds in Special Assessment Warrant No. 100.

II.

Section 86a of the Local Improvement Act is constitutional.

Under this point petitioner contends that Section 86a is unconstitutional because it violates the 14th amendment to the Federal Constitution in that it denies equal protection of the law, and also violates Section 22 of Article 4 of the Constitution of the State of Illinois because it is special legislation granting special privileges to certain persons. As we understand counsel's argument, the provisions of Section 86a which require the holders of seventy-five per cent of any securities issued against any assessment, or any installment or installments, is an unreasonable and arbitrary classification. In support of petitioner's contention, the rule is cited from the case of *Michigan Millers Mutual Fire Insurance Company* v. *McDonough*, 358 Ill. 575, as follows:

> "To avoid falling within the constitutional inhibiti n of special legislation the classification of subjects or objects must be based upon some reasonable and substantial difference in kind, situation or circumstance bearing a proper relation to the purposes to be attained by the Statute."

Counsel also cites from the case of *People* v. *Seemann*, 302 Ill. 538, 547, the following:

> "A distinction in legislation is not arbitrary if any set of facts can reasonably be supposed to sustain it, but it must rest upon a reasonable basis, and a classification is not valid which has no reasonable basis but is essentially arbitrary."

The requirement that the bondholders of a special assessment proceeding should take certain steps as prescribed by Section 86a for the purpose of refunding their securities is in consonance with the foregoing rules. As we have heretofore pointed out, the bondholders in a particular special assessment warrant are the only ones who have any interest in the funds to be collected in that warrant for the retirement of their bonds.

It is claimed Section 86a is unconstitutional and void because it requires the village board to pass refunding ordinances whenever the holders of seventy-five per cent of the securities payable from any assessment or installment or installments of an assessment petition therefor. It is claimed the use of the seventy-five per cent is arbitrary and bears no relation to the matter dealt with by this legislation.

The general procedure provided for in Section 86a is first, that a petition be filed with the municipality by at least the holders of seventy-five per cent of the outstanding bonds; second, that, thereupon, a refunding ordinance be passed by the municipality, directing that a refunding petition be filed by the municipal authorities in the court having jurisdiction of the original assessment; that, thereafter, an opportunity is provided to procure consents from the remaining bondholders, if any, who did not join in the original petition (all of whom must deposit their securities before any judgment order of refunding can be entered); and finally, the entry of a judgment order of refunding is dependent upon the approval of one hundred per cent of the bondholders. In short, the holders of seventy-five per cent of the outstanding securities must consent to the plan before it can be even proposed, and one hundred per cent must join in the plan before it can be consummated. Abundant analogies are furnished by

various sections of the Federal Bankruptcy Act. For example, sections 401-404, entitled "Local Taxing Agencies", require the consent of not less than fifty-one per cent of the security-holders before a plan can be filed in court, and the consent of two-thirds is necessary to put the plan into operation. For constitutional reasons, Section 86a requires the ultimate consent of one hundred per cent, but only seventy-five per cent are needed to initiate the proceeding.

It seems to us the per cent might have been fifty or ninety or one hundred. It seems the legislature was justified in making the per cent seventy-five or even larger because the Act requires all security holders (whose securities are payable from the assessment or installment or installments to be extended and refunded) must ultimately consent by depositing the securities as provided in the Act or be paid off.

It doubtless was considered that the village ought not to be required to pass ordinances until enough owners joined in the petition to make it fairly probable that all would ultimately consent and it, therefore, would seem that there is a direct relation between the requirement of seventy-five per cent and the legislation then being dealt with.

It therefore seems to us that the foregoing authorities cited on this point by counsel for petitioner are not applicable to the facts dealt with in this legislation.

Since Section 86a provides that the holders of seventy-five per cent of the bonds have the right to apply to the municipality for a refunding, and further provides that no refunding can be made unless all of the bondholders in that particular warrant consent to the refunding of such a proceeding, certainly these provisions cannot be said to be arbitrary and unreasonable. On the other hand, it

would be extremely unreasonable if Section 86a required the bondholders in one warrant in which they had an interest to refund other warrants in which they had no interest.

The case of *Sturges and Burn Manufacturing Company* v. *Pastel*, 301 Ill. 253, and the case of *Binney* v. *Long*, 299 U. S. 280, are not in point, and have nothing to do with the questions raised by petitioner in its appeal.

CONCLUSION.

Respondent respectfully submits that Section 86a of the Local Improvement Act is constitutional and that the Supreme Court of the State of Illinois properly affirmed the judgment of the County Court of Cook County.

Wherefore, respondent prays that the application for writ of certiorari be denied.

Respectfully submitted,

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